

The sole issue raised on review by the respondent is whether the claimant is entitled to attorney fees for services rendered in the post-award proceedings and, if so, whether the ALJ's Order granting fees in the sum of \$2,336.20 was appropriate.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Respondent initially maintains claimant's counsel is not entitled to attorney fees as his request on claimant's behalf for post-award medical treatment should have been more properly characterized as a request for a change of physician. And that as a post-award request for a change of physician, it does not fall within the proceedings delineated in K.S.A. 44-536(g), which authorizes an ALJ to grant an award of attorney fees.

At the hearing on this request, held on September 17, 2002, the ALJ concluded claimant was requesting a change of physician. The next day the ALJ issued an order directing respondent to designate a list of three physicians from which claimant could select one to direct her care. Respondent complied with this order and the list of three physicians was delivered to claimant's counsel on September 23, 2002.

Respondent's argument that this request is not among those set forth in the statute that authorizes attorney fees and costs associated with post-award proceedings is misplaced. K.S.A. 44-536(g) allows for attorney fees, post-award, in certain situations.

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for penalties or otherwise, such attorney shall be entitled to attorney fees for such services...such services include an award of medical compensation, but not an award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection. . .<sup>1</sup>

Respondent fails to acknowledge either the phrase "or otherwise" and "or other benefits" in asserting its argument. Both phrases certainly contemplate a post-award request for a change of physician. If these phrases were construed to exclude such a request, there would be no incentive for attorneys to represent claimants in their efforts to secure more suitable medical treatment. Such a result is contrary to the purpose of the statute.

While this provision is certainly a bitter pill for an employer or his insurer to swallow, it is necessary to assure continued representation of claimant after an award. An additional benefit accrues to all concerned from this added incentive on the part of respondent to resolve post-award disputes without protracted litigation.<sup>2</sup>

---

<sup>1</sup> K.S.A. 44-536(g).

<sup>2</sup> Timothy A. Short, *Attorney Fees for Representing a Claimant After Final Award*, Journal of the Kansas Trial Lawyers Association, Vol. XIII, No. 2, p. 13 (1989).

Thus, the Board finds that the ALJ was authorized to enter an award of attorney fees for this post-award request for a change of physician.

In making his Order, the ALJ awarded the full amount requested, \$2,336.20, based upon 19.30 hours for attorney and assistant time, for a total sum of \$1,623, plus an additional \$713.20 for expenses, including copying, postage, mileage, long distance charges and payment to claimant's medical expert.

After considering the affidavit offered in support of claimant's counsel's claim for fees, the Board finds that the expenses associated with Dr. Prostic are not recoverable under K.S.A. 2002 Supp. 44-510k. "Costs" as defined in that statute include,

but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

The statute does not include as costs the expenses associated with paying one's medical expert. Accordingly, the \$430 prepayment to Dr. Prostic and the subsequent \$230 payment to Dr. Prostic should be excluded from the list of allowable expenses.

As for the total amount of attorney fees, the Board also finds the amount must be reduced. As of September 18, 2002, respondent was directed to provide claimant with a list of three physicians from which she was to select one to direct her care. That list was transmitted and received by claimant's counsel by September 23, 2002. As of that date, the post-award relief sought had been obtained. For that reason, any hourly time spent after September 23, 2002, along with any expenses incurred after that date, are hereby disallowed.

When recalculated, the total attorney and assistant time spent was 16.30 hours, for a total of \$1,377. That, added to the recalculated costs of \$42.85, totals \$1,419.85. Accordingly, claimant's counsel is awarded \$1,419.85 (16.30 hours of work and \$42.85 in costs).

### **AWARD**

**WHEREFORE**, Administrative Law Judge Brad E. Avery's post-award Order dated May 9, 2003, is modified as set forth above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2003.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Chris Miller, Attorney for Claimant  
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director